

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

UNITED STATES OF AMERICA : DOCKET NO. 4:19CV415  
:   
VS. : SHERMAN, TEXAS  
: JUNE 4, 2020  
ALEXANDRU BITTNER : 9:00 A.M.

TELEPHONE CONFERENCE  
BEFORE THE HONORABLE AMOS L. MAZZANT,  
UNITED STATES DISTRICT JUDGE

APPEARANCES (BY TELEPHONE):

FOR THE PLAINTIFF: MR. HERBERT WEST LINDER  
US DEPARTMENT OF JUSTICE  
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DALLAS, TX 75201

FOR THE DEFENDANT: MR. FARLEY P. KATZ  
MS. RACHAEL ELISA RUBENSTEIN  
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PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY, TRANSCRIPT  
PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

1 THE COURT: Good morning. This is Judge Mazzant.  
2 We're here in 4:19CV415, and we're here for argument on the  
3 various motions for summary judgment.

4 And I know that there was an email exchange I think  
5 with my staff and Mr. Michaels regarding the amicus. I did  
6 not grant your ability to speak at the hearing. I did allow  
7 the fact that you could file a brief and we would consider  
8 that. But I didn't know if you had any conversation with  
9 the other parties in this case regarding the hearing, but I  
10 know you included in your amicus brief the request and, of  
11 course, I hadn't ruled on that. But typically in District  
12 Court we look at motions that are filed separately, not as  
13 included in the brief, and so I'll be candid, I didn't pay  
14 attention to that.

15 But my intent was never to have you argue at the  
16 hearing but simply we would consider your briefs on the  
17 matter. But you're welcome to listen in to the hearing  
18 since we are in the courtroom and it's a live hearing.

19 So let me ask for the two parties, since you have  
20 competing motions, have y'all discussed who would like to go  
21 first? It does not make a difference to the Court.

22 MS. RUBENSTEIN: Your Honor, this is Rachael  
23 Rubenstein, Defendant Bittner's counsel. I looked at the way  
24 it was scheduled and I understood that we would go first.

25 THE COURT: That's fine. Go ahead.

1 MR. LINDER: That's fine.

2 MS. RUBENSTEIN: Okay. So I'm going to start with  
3 the issue -- there's one issue in Defendant's motion.  
4 Defendant's motion asks, does 31 USC 5321(a)(5)(B)(1) limit the  
5 maximum penalty that can be assessed for a non-willful failure  
6 to timely file an FBAR to \$10,000? Defendant contends it does.  
7 The language of the statute is clear. Resolution issue would  
8 limit the Government's claim to a maximum of \$50,000 and not  
9 the \$2,720,000 the Government is seeking.

10 Before I get into -- excuse me -- our argument, I would  
11 like to go over some background facts which I think are  
12 helpful. This -- so, Your Honor, we did provide a  
13 PowerPoint presentation and I'll reference that when I, you  
14 know, am talking about that part. The background facts are  
15 not there.

16 THE COURT: And I have that.

17 MS. RUBENSTEIN: Thank you.

18 Mr. Bittner was born and raised in Communist Romania,  
19 and he lived there for his childhood into early adult life.  
20 In 1982 in his early twenties he legally immigrated to the  
21 United States to escape the Communist regime and  
22 discrimination against Jews.

23 He had help from the immigrant -- the Hebrew Immigrant  
24 Aid Society. He learned English as his third language.

25 In 1987 he became a naturalized citizen. When he was

1 in the United States, Mr. Bittner was a dishwasher, a waiter  
2 and eventually a plumber.

3 In 1990, that was when the Romanian Revolution occurred  
4 and the fall of communism. Mr. Bittner at that point had  
5 been living in the United States for eight years. Three of  
6 those years he was a naturalized citizen.

7 He decided to return to Romania after the fall of  
8 communism, believing that he would have better opportunity  
9 there in his home country. When he returned to Romania, he  
10 formally moved back there in 1991 with his family and there  
11 he remained. He continued to reside in Romania for 20 --  
12 more than 20 years, and it wasn't until 2011 that he moved  
13 back to the United States.

14 For those 20 plus years he was living in Romania, he  
15 only visited the United States on a few occasions.

16 While in Romania, Mr. Bittner did file some U.S. tax  
17 returns. Those were prepared by either his sister or his  
18 brother-in-law, and these would have been a few tax returns  
19 in the 1990s. In those 1040 returns prepared by his sister  
20 or his brother-in-law, he reported a small amount of U.S.  
21 source income, and that U.S. source income came from a  
22 minority interest Mr. Bittner had in his sister and  
23 brother-in-law's restaurant in California.

24 When he moved back to the United States in 2011, he  
25 discovered -- he learned at that point that he should have

1 been filing tax returns to the United States Government  
2 reporting his worldwide income, not just his U.S. source  
3 income.

4 At that point Mr. Bittner became quite nervous that he  
5 was out of compliance with U.S. tax law, and as a result, he  
6 very soon began -- very soon after his return he began  
7 searching for a professional that could help him come into  
8 compliance with U.S. law.

9 He located a CPA named Jeff Beckley in Plano, Texas,  
10 and tha CPA advertised on his website that he had expertise  
11 in advising individuals like Mr. Bittner, individuals who  
12 earned income abroad.

13 When Mr. Bittner -- Mr. Bittner visited Mr. Beckley  
14 many times to try to see what needed to happen to get into  
15 compliance. In visiting with CPA Beckley, he told him  
16 he had foreign income. He told him he had foreign accounts.  
17 He told him he had Romanian business interests, and he  
18 provided Mr. Beckley with pretty much -- or he did provide  
19 Mr. Beckley with everything Mr. Beckley asked him to  
20 provide.

21 Mr. Beckley went on and prepared Form 1040 tax returns,  
22 22 years' worth of back tax forms. He also prepared back  
23 FBARs for Mr. Bittner.

24 FBARs are the forms at issue here. They require filers  
25 to report financial interest or signatory authority or other

1 interest that they have in foreign financial accounts.

2 It was only from Mr. Beckley where Mr. Bittner first  
3 learned anything about FBARs. He had never heard about that  
4 obligation before, and frankly, there would be no reason for  
5 him to have ever heard of it before, before that time, while  
6 he was living in Romania.

7 He went ahead and filed, through Beckley, FBARs. These  
8 FBARs and the tax returns filed by Beckley had many errors.  
9 Beckley was, frankly, not competent to represent somebody  
10 like Mr. Bittner and was not competent to render advice in  
11 this area of law.

12 One of the main mistakes Beckley made with respect to  
13 the prior year tax returns is he made a treaty election. He  
14 reported basically the gross income that he determined Mr.  
15 Bittner had in those years from worldwide sources, but then  
16 he backed it out from the return under a treaty exemption.  
17 Well, the treaty doesn't apply.

18 So after that happened, Mr. Bittner began to get  
19 notices from the IRS. These notices are called mass error  
20 notices. Mass error notices allow the IRS to automatically  
21 assess, without what we call deficiency rights,  
22 automatically assess taxes due. That happened at the  
23 beginning of this case. There was over \$6 million of  
24 automatic assessments that Mr. Bittner began to receive  
25 notices for in 2012.

1 That panicked him, as it should, and he retained legal  
2 counsel. He retained Mr. Katz in our firm. That was in  
3 2012.

4 Shortly thereafter he also retained a new CPA. The new  
5 CPA, Mr. Booker, went on to prepare amended tax returns for  
6 Mr. Bittner, correctly identifying, you know, all the income  
7 and foreign tax credits and the items that needed to be  
8 reported. That was for years 2006 through 2011.

9 Then also Mr. Booker prepared corrected FBARs on behalf  
10 of Mr. Bittner, and those corrected FBARs were submitted to  
11 the IRS in 2013. In this matter the Government concedes  
12 those FBARs were accurate for the purposes of analyzing this  
13 motion. And those FBARs simply required Mr. Bittner to give  
14 basic information, to identify that he had 25 or more  
15 accounts, financial interest, and to list the number of  
16 accounts. No further information was required under the  
17 statute or the regulations or the instructions with respect  
18 to what needed to go in the FBARs. He wasn't required to  
19 report the account number, the account name, or the account  
20 balance. Simply, he was required to check the box, report  
21 the number of accounts and that was all.

22 However, in 2013, on advice of counsel, Mr. Bittner  
23 went ahead and included a 36 page schedule, with attached  
24 the FBARs he filed as corrected, and that schedule fully  
25 disclosed the account numbers, the bank, the balances, all

1 of that information.

2       Importantly, most of these accounts -- the vast  
3 majority of these accounts are company accounts. The reason  
4 Mr. Bittner is required under the regulation to report those  
5 company accounts is because he had 50 percent or he had more  
6 than 50 percent interest, he owns more than 50 percent of  
7 the company.

8       These were operating Romanian companies. Mr. Bittner  
9 was really an investor in these companies. He did not  
10 operate the day-to-day. He did not have signatory authority  
11 over any of the accounts. He simply had controlling  
12 interest, and that controlling interest is what really at  
13 that point gives rise to the obligation to report the  
14 account. Beckley didn't know that. Mr. Bittner didn't know  
15 that. And that's -- that's why the corrections were made.  
16 And, again, the corrections were voluntarily made and they  
17 were made before the IRS ever opened an examination of Mr.  
18 Bittner.

19       So going on, after the amended return and the  
20 examination of Mr. Bittner, in 2017 the IRS issued a notice  
21 of deficiency related to additional taxes the IRS was  
22 proposing. That case went to tax court. An agreed decision  
23 was entered on November 12th, 2019.

24       And importantly, with respect to the years at issue  
25 here, 2008, '09 and '10, Mr. Bittner owed no tax deficiency.



1 For 2007 he owed a small deficiency of about \$46,000, which  
2 has been fully paid. So there is no non-tax compliance at  
3 issue in this case. Mr. Bittner is fully compliant with his  
4 tax obligations.

5 In June of 2017 the IRS also assessed, after four years  
6 of an examination, FBAR penalties. These FBAR penalties are  
7 non-willful. They were assessed on a per account basis by  
8 the Department, and those penalties total 2 million --  
9 \$2,720,000. So \$10,000 per each account, there was 272  
10 accounts in total, and that's what the Government went with.

11 So in calculating this penalty and in making their  
12 penalty assessment, the sole information relied upon by the  
13 Government, by the IRS, is information supplied by Mr.  
14 Bittner voluntarily before an exam commenced.

15 We're talking about non-willful penalties. Non-willful  
16 conduct is conduct that is innocent, or at worst, negligent.  
17 This contrasts to willful. Willful penalties and the  
18 definition of willfulness is intentional violations of known  
19 legal duties.

20 So with that said, we get back to the issue here, the  
21 statute. Does the Statute 5321(a)(5)(B)(1) tax the  
22 non-willful penalty to \$10,000 per form? It does.

23 Going to slide -- well, let me back up a minute. Let's  
24 go to slide four of Bittner's PowerPoint demonstrative  
25 exhibit. Slide four is 31 USC 5314. Forty-one -- 31 USC

1 5314, that is where the FBAR reporting obligation -- that is  
2 the statute that gives rise to the reporting obligation. It  
3 begins with a limiting instruction. It says considering the  
4 need to avoid impeding or controlling the export or import  
5 of monetary instruments and the need to avoid burdening  
6 unreasonably a person making a transaction with a foreign  
7 financial agency, the Secretary of the Treasury shall  
8 require a resident or a citizen essentially to keep records,  
9 file reports when such person maintains a relation with a  
10 foreign financial agency.

11 That's all the statute says with respect to the  
12 obligation. It's the regulation, the implementing  
13 regulation that gives further detail about what is required  
14 when somebody has a relation with a foreign financial  
15 agency.

16 The implementing regulation on slide five is 31 CFR  
17 1010.350, reports of foreign financial accounts. So that  
18 regulation says a person who is a resident or a citizen of  
19 the United States who has a financial interest in, signatory  
20 authority over, or other authority with respect to a foreign  
21 financial account shall provide such information essentially  
22 on an FBAR. They shall provide such information as required  
23 on an FBAR.

24 The implementing regulation also notes that there is a  
25 special rule with respect to persons with financial

1 interests in 25 or more accounts. This special rule  
2 actually modifies the reporting obligation making it less  
3 burdensome.

4 On slide six -- slide six is Subsection G(1) of the  
5 implementing regulation for somebody who has financial  
6 interest in 25 or more accounts, and it right there in the  
7 regulation says they need only provide the number of  
8 financial accounts and certain other basic information on  
9 the report at the time of filing, right? But they are  
10 required to essentially retain information and they are  
11 required to provide that, if they're requested to do so by  
12 the Secretary or a delegate, such as the IRS. So, again,  
13 Mr. Bittner though, he provided that information in advance  
14 of being requested.

15 So the implementing regulation refers to a form. We  
16 call that form an FBAR. The -- the filing threshold that  
17 gives rise to the FBAR obligation to file, it's a \$10,000  
18 filing threshold, so 10,000 of the aggregate balance in all  
19 foreign financial accounts. So that's important in the  
20 sense that an individual is only required to file an FBAR if  
21 the aggregate value across all foreign financial accounts  
22 exceeds \$10,000.

23 So they can have, for example, you know, ten accounts  
24 and three of those accounts could have a dollar in it, but  
25 if one of the accounts has more than \$10,000, all of the

1 accounts get identified and reported on the FBAR, unless  
2 there's a special waiver of the FBAR.

3       Significantly -- excuse me. I'm going to skip slide  
4 eight. Slide 9 is a screenshot of the actual FBAR form.  
5 Question 14 on the FBAR form, that is the question of does  
6 the filer have a financial interest in 25 or more accounts.  
7 If yes, you enter the number of accounts. In the  
8 parenthetical it says, if yes is checked, do not complete  
9 part two or part three but retain records of this  
10 information.

11       Moving to slide ten, to summarize, a U.S. citizen or a  
12 resident who has a financial interest in or signatory  
13 authority over foreign accounts with an aggregate balance of  
14 10,000 is required to file an annual form, the FBAR. They  
15 only file one form, regardless of the number of accounts.  
16 Again, 25 or more accounts, you check a box and you list the  
17 number of accounts. You do not complete any other  
18 information with respect to amounts, the balance, the  
19 account number or the address or the name of the bank.

20       So it's undisputed in this case that Mr. Bittner had a  
21 financial interest in 25 or more accounts for each of the  
22 years at issue. Most -- again, the vast majority of these  
23 accounts are not his personal accounts. These were accounts  
24 of Romanian entities, operating companies in which he owned  
25 more than 50 percent of the interest.

1       So Mr. Bittner was required to file five FBARs, one per  
2 year, to check the box indicating he had a financial  
3 interest, identify the number of accounts.

4       Slide 12 has a screenshot of the 2007 FBAR that was  
5 filed and stamped as received, the corrected FBAR filed and  
6 stamped as received in September of 2013. This is all the  
7 information -- this is the complete form. You'll see the  
8 signature and then date 9-17-2013.

9       Slide 13, that is a sample of one page of the 36 page  
10 schedule that Mr. Bittner voluntarily included. So this is  
11 a sample showing, for instance, the entity Ecofish. Ecofish  
12 had, you know, various bank accounts at one, two, three --  
13 five different banks, and then Mr. Bittner is indicating the  
14 highest balance, you know, in each year in each account and  
15 providing that information to the IRS for Ecofish.

16       So there was one -- there would have been a schedule  
17 page for each entity describing the amounts, the numbers of  
18 the bank, all of that info.

19       Moving to slide 14, these are Mr. Bittner's personal  
20 accounts and his only personal accounts that gave rise to  
21 any FBAR obligation. You know, in A through E, those are  
22 all Romanian accounts. Count F, that was an account in  
23 Liechtenstein where he did some business there, and then  
24 you'll notice that the Liechtenstein account had less than  
25 \$10,000 in it for each year. It was, you know, a de minimus

1 account.

2 Then the last account, the Royal Bank of Canada  
3 account, which is focused on extensively by the Government,  
4 that is a Swiss account that Mr. Bittner had.

5 Moving to slide 15, slide 15 is where we really get  
6 into the statutory construction issue here. 31 USC  
7 5321(a)(5)(A), that authorizes a penalty. The Secretary of  
8 the Treasury may impose a -- a civil money penalty on any  
9 person who violates or causes any violation of any provision  
10 of Section 5314. We discussed 5314 earlier, and 5314 --  
11 5314 gives rise to the obligation to file an FBAR. So  
12 Subparagraph A is the authorization statute.

13 Moving to slide 16, Subparagraph B is the amount. This  
14 is what authorizes the amount of the penalty. The amount of  
15 any civil penalty imposed under Subparagraph A shall not  
16 exceed \$10,000. The amount of any civil penalty, any  
17 non-willful civil penalty, shall not exceed \$10,000. Mr.  
18 Bittner is assessed only non-willful penalties. We are not  
19 talking about any other type of penalties except  
20 non-willful.

21 Subparagraph B(2) is the reasonable cause exception.  
22 B(2) is a safe harbor reasonable cause exception. It allows  
23 for the imposition of no penalty, provided that the filer  
24 had a reasonable cause and that eventually they cured any  
25 defects that they had in the original filing. Just like Mr.

1 Bittner did, right? And eventually correctly reported, you  
2 know, the balance.

3 Slide 17, Subparagraph C, that deals solely with  
4 willful violations. That is the amount talking about for  
5 willful violations, and when there's a willful violation,  
6 that willful violation is tied to the --

7 There's a lot of feedback in the background. I'm  
8 sorry. Can I pause for a moment?

9 THE COURT: That's fine. We're not hearing it here,  
10 so --

11 MS. RUBENSTEIN: Okay. I'll try to ignore it.

12 All right. Subparagraph C of 31 USC 5321(a)(5), that  
13 is for willful. A willful penalty is different, right? A  
14 willful penalty is tied to account balances by statute,  
15 because it allows for a max penalty of the greater of a  
16 hundred thousand or 50 percent of the amount determined  
17 under Subparagraph D.

18 When you go to the next page, right, that's  
19 Subparagraph D. That's talking about amounts. But  
20 Subparagraph D for this penalty statute is only connected to  
21 the willful. Subparagraph D has nothing to do with the  
22 non-willful component of the penalty statute.

23 THE COURT: Let me ask you this. How do you  
24 reconcile the language in the non-willfulness provision with  
25 that here in the willfulness provision? Because it appears

1 that the underlying violation is the same, failure to report.

2 So the penalty for willful failure to report is assessed based  
3 on the balance in the account, which seems to contemplate a  
4 penalty on an account by account basis. Why wouldn't the  
5 non-willful penalty be understood in the same way?

6 MS. RUBENSTEIN: Well, I think that goes back to the  
7 legislative history. You know, prior to 2004 and the passage  
8 of the American Jobs Act, there was no penalty for any  
9 non-willful violation, right? Only willful violations were  
10 penalized.

11 THE COURT: Well --

12 MS. RUBENSTEIN: It was in --

13 THE COURT: Well, let me just ask you -- I mean, you  
14 want to pull out the legislative history, but the Court looks  
15 at the text first and we don't go beyond the text of either the  
16 regulation or the statute unless there's some ambiguity. So  
17 reading those all together, and absent the legislative history,  
18 why should it be treated differently, since the overall concept  
19 is failure to file a report, whether willful or non-willful in  
20 terms of the penalty?

21 MS. RUBENSTEIN: Well, I think when we look at 31 USC  
22 5321, you know, and we look at the non-willful, we've got one  
23 statutory provision to look at, Subparagraph B, amount of  
24 penalty. And it says the amount of any civil penalty imposed  
25 under Subparagraph A, right? The non-willful shall not exceed



1 \$10,000, period. So I'm not sure there is any language to  
2 reconcile.

3 The part two, right, that's just the safe harbor. It  
4 shouldn't be construed to expand further upon what is  
5 already limited by part one.

6 I'm not sure how -- how we would read the safe harbor  
7 that's allowing for no penalty to end up putting an  
8 unlimited amount of penalties under, you know, Subparagraph  
9 1, which specifically says the amount of any civil penalty  
10 imposed shall not exceed \$10,000.

11 THE COURT: Well, wouldn't it be absurd -- an absurd  
12 result to penalize somebody with 58 accounts who fails to file  
13 an annual FBAR the same as someone who just has two or three  
14 accounts who also fails to file his FBAR?

15 MS. RUBENSTEIN: Not if it's not willful, because  
16 non-willful is sort of innocent or negligent conduct. You  
17 know, it's inadvertent. So, no, I don't think it would be  
18 absurd. I mean, the opposite would be absurd.

19 So if -- I think I've got an example here, so let's  
20 see. Let's take the example of the Government's  
21 interpretation, right? So let's consider an individual who  
22 maintains a foreign account, one with \$150,000 balance,  
23 right? And they willfully do not report that. In that  
24 instance, the maximum penalty under the statute, under  
25 Subparagraph C(1), would be a hundred thousand dollars.

1 Say you have another individual, right, who  
2 non-willfully fails to file an FBAR and that person has 20  
3 accounts and their highest aggregate balance for all those  
4 accounts is \$70,000. If you go with the Government's  
5 interpretation, that's absurd because that person with  
6 non-willful would owe \$200,000, double the amount of the  
7 non-willful -- yeah, double the amount of the willful actor.  
8 That doesn't make any sense.

9 So getting back to -- we discussed the legislative  
10 history a bit. I'll just finish that up by saying, I mean,  
11 yes, there was no penalty before 2004 for non-willful  
12 conduct. Congress felt that there should be a de minimus,  
13 you know, modest penalty for that as well to encourage  
14 compliance. And this is to encourage compliance, not to be  
15 punitive, right?

16 So encouraging compliance -- I'm on slide 19 -- the  
17 provision adds an additional civil penalty, an additional  
18 civil penalty may be imposed on any person who violates this  
19 reporting requirement, without regard to willfulness. This  
20 new civil penalty is up to \$5,000. Now, the --

21 THE COURT: Well, let me -- let me ask you this. So  
22 if deterrence is the issue and penalties are supposed to deter  
23 future violations, how does your interpretation of Section 5321  
24 provide the requisite amount of deterrence when it would assess  
25 only a small penalty for an otherwise large violation? It

1 could encourage those with a lot of money in foreign bank  
2 accounts to basically turn a blind eye to the reporting  
3 obligations and simply accept the \$10,000 penalty as a small  
4 price to pay for keeping their accounts out of the U.S.  
5 supervision. What about that?

6 MS. RUBENSTEIN: Well, that's -- that's one of the  
7 distinctions between willful and non-willful. So if it's  
8 non-willful -- I mean, if it's willful conduct, they're going  
9 to be penalized much, much greater. If it's non-willful, a  
10 small penalty is a sufficient deterrence because it's sort of  
11 an education mechanism, not a punitive mechanism.

12 And it worked for somebody like Mr. Bittner perfectly  
13 because, one, he volunteered to do it even before he had to,  
14 and two, he has continued to do it. So, I mean, it  
15 served -- it's sufficient, and it's sufficient to deter when  
16 this conduct is non-willful. And if the conduct is not  
17 non-willful, if it's willful, then the deterrence -- then  
18 it's beyond deterrence. Then there's some punitive  
19 penalties that come into play.

20 So moving to slide 20, again, we are talking about a  
21 determination that has been made of non-willfulness. You  
22 know, there's a lot of argument in the Government's motion  
23 or innuendo and extraneous information trying to hint around  
24 willfulness concepts, but that's not what we have here.  
25 There's already been a determination of non-willful conduct.

1           So rather than fine Mr. Bittner \$10,000, which would  
2           have totaled 50,000, which is still not an insignificant  
3           amount of money, you know, the Government is charging a  
4           \$2,720,000 penalty for not filing an information reporting  
5           form, not filing five information reporting forms. They're  
6           interpreting this as 272 separate violations.

7           Again, you know, we think the interpretation is fairly  
8           clear that Section 50 -- or it's fair to say the statute  
9           says "a", in the singular, civil monetary penalty when  
10          you're talking about non-willful, and it shall not exceed  
11          \$10,000.

12          He didn't file five FBARs. He should have. He didn't.  
13          It was non-willful. He didn't know about it. He was in  
14          Romania. He had no reason to know about it. You know, he  
15          doesn't -- people that live abroad for decades or even, you  
16          know -- they don't view their accounts as foreign when their  
17          accounts are where they live. You know, Mr. Bittner is in  
18          Romania. These are Romanian business accounts.

19          And for those reasons -- oh, and the rule -- I do want  
20          to bring up the rule of lenity here and then I'll finish.  
21          The rule of lenity essential says it applies in the context  
22          of civil penalties and it says it only comes into play if  
23          the statute is ambiguous.

24          Mr. Bittner contends it is not. But if the Court is to  
25          find the statute is ambiguous, then the rule of lenity

1 applies. Where there's two reasonable interpretations, you  
2 go with the more lenient interpretation, not the more  
3 punitive interpretation.

4 Also important is even the IRM guidance -- and the IRM  
5 is the Internal Revenue Manual -- is not binding but still  
6 guidance that is imposed on examiners when they're reviewing  
7 FBARs. It also limits. It says, you know, only one \$10,000  
8 penalty in almost every case should apply unless there is  
9 unique facts and circumstances and then there's sort of  
10 different layers of review. But the guidance is fairly  
11 clear in almost all instances, a max -- only a \$10,000  
12 penalty is supposed to be applied, and that's sufficient to  
13 deter compliance.

14 And for those reasons, we ask the Court to grant Mr.  
15 Bittner's motion.

16 THE COURT: Well, let me ask you one other question  
17 regarding United States versus Boyd. I know it's not -- it's  
18 outside our jurisdiction, but how do you distinguish that  
19 decision and why I shouldn't follow the reasoning there?

20 MS. RUBENSTEIN: Well, a couple things with Boyd. I  
21 mean, it was wrongly decided. It's on appeal. And there, the  
22 Court focused too much on the language that had to do with  
23 willful, not non-willful, so the Court I believe got a bit  
24 distracted by the willful provision. And the Court also overly  
25 relied on analyzing the safe harbor to expand further upon the

1 actual -- you know, the Court relied too much on the safe  
2 harbor provision and the language therein and didn't look at  
3 the actual penalty authorization and the penalty amount of the  
4 non-willful statute.

5 Also, when we're talking about Boyd from a factual  
6 distinction, you know, Boyd's penalty was I believe \$40,000,  
7 around that amount. And also in Boyd, the IRS examiner --  
8 there was a bigger account at issue, but the IRS examiner  
9 applied mitigation and did a lesser penalty for the years at  
10 issue.

11 So, I mean, we don't have the same level of sort of  
12 overreach and abuse in Boyd as we have here, and I think  
13 that does come into play when you're thinking about this  
14 case and the big picture and, you know, this huge penalty  
15 being asserted against an individual for non-willful  
16 conduct.

17 I mean, in addition, Boyd misapplied the rule of  
18 lenity. Boyd sort of looked at the rule of lenity, and then  
19 instead of taking the more reasonable interpretation that is  
20 the more lenient approach, it goes with the more punitive  
21 interpretation.

22 THE COURT: Okay. Thank you.

23 MS. RUBENSTEIN: Thank you, Your Honor.

24 THE COURT: Mr. Linder?

25 MR. LINDER: Thank you, Your Honor. Good morning.

1 In regards to some of the background information  
2 counsel has brought up, the tax -- tax court and tax  
3 liability is really not at issue in this case. That was  
4 decided in the tax court, and all the reliance on Mr.  
5 Beckley and all the information about Mr. Beckley is really  
6 not at issue because that goes to reasonable cause and that  
7 really goes -- it really only would be applicable to 2011  
8 year.

9 What is clear in this case is that Mr. Bittner had 272  
10 accounts he should have reported and he failed to timely  
11 report those.

12 In regards to the legal issues, I think Mr. Bittner's  
13 position wants to -- I think, as the Court pointed out, he  
14 wants to ignore or not consider the other parts of the  
15 statute, which are the willful, which is on a per account  
16 basis, and on the reasonable cause which specifically refer  
17 to a per account basis. And when these are read in  
18 conjunction with the purpose of the statute under 5314 and  
19 the implementing regulation, 10.350, the purpose is the  
20 statute wants the reporting of financial accounts. And the  
21 failure to report the financial account is the violation.

22 The goal is to have individuals report their foreign  
23 financial accounts as required. The goal is not just to  
24 file a form that is meaningless. The form is a convenience  
25 or the mechanism that a taxpayer is to use to report all

1 their financial accounts.

2 THE COURT: Well, Mr. Linder, let me ask, if Congress  
3 wanted to authorize penalties per account, why doesn't the  
4 statute say per account or otherwise indicate an intent to  
5 penalize individuals on the basis of each account maintained?

6 Presumably Congress knew how to use this sort of  
7 language, as reflected in the willfulness portion of the  
8 statute which references the balance in the account, but it  
9 didn't do so here. So why?

10 MR. LINDER: I'm not sure why. I guess they could  
11 have written it better, but I think when you look at the  
12 statute as written in conjunction with the other parts of the  
13 statute and in conjunction with what they were trying to  
14 achieve, is the reporting of accounts by the legislature  
15 history and by looking at 5314 and 1010.350, if they wanted the  
16 reporting of account.

17 How it was to be reported is left up to the Secretary.  
18 I mean, I guess the Secretary could have implemented a rule  
19 that said you have to file an FBAR for every account. That  
20 would be incredibly burdensome. But they didn't. They  
21 lessened the burden on the taxpayer and said you have to  
22 file one form but you have to report all your accounts. If  
23 it's more than 25, you don't have to report the specific  
24 account information, like was explained by counsel.

25 But it doesn't relieve the taxpayer of reporting the



1 accounts. That's the information Congress sought. The  
2 violation is the reporting of the account, not the form.  
3 Congress didn't look for a form. They're looking for the  
4 account. Account is used everywhere in the statute. It's  
5 in the regulations. That's what they're looking for is the  
6 account information and the reporting, not a form. The form  
7 is the mechanism of the reporting.

8 THE COURT: But doesn't the statute penalize  
9 violations of the Secretary implementing regulations which are  
10 reporting requirements? So shouldn't the penalty be understood  
11 in terms of whether the report was filed, which does not depend  
12 on the number of accounts?

13 MR. LINDER: I would disagree. I think it -- I think  
14 if you look at the U.S. demonstrative and you look at an FBAR  
15 that reports one account over five years at five and an FBAR  
16 that should have reported 272 accounts, they're completely  
17 different, and I think it's understood. I mean, they don't  
18 provide the same information and they're not the same, and so  
19 the violation should not be the same.

20 The violation is the account, not reporting the  
21 account. The form is the mechanism. I don't see how -- if  
22 they wanted to violate a form, they wouldn't have had to  
23 mention accounts anywhere in the statute. They could have  
24 said hey, if you don't file the form, it's \$10,000. That's  
25 not the case here. The case is they want the accounts

1 reported.

2 THE COURT: Well, doesn't this result or your  
3 interpretation lead to some absurd results? For example -- and  
4 I know they gave an example. I'll give you a different one.  
5 But if someone with a foreign account with \$50,000 in it who  
6 fails to file the FBAR would be subject to a \$10,000 civil  
7 penalty, whereas somebody with five foreign accounts with  
8 \$10,000 balances in each account would be subject to five  
9 \$10,000 civil penalties under your interpretation, for a total  
10 of \$50,000 in penalties. Why would Congress want to penalize  
11 those two individuals so drastically differently?

12 MR. LINDER: I think that they're penalized  
13 drastically differently because the purpose is they want the  
14 accounts reported. They don't want the hidden accounts. The  
15 problem that was going on --

16 THE COURT: But, Mr. Linder --

17 MR. LINDER: -- is --

18 THE COURT: Mr. Linder, let me interrupt. We're  
19 dealing with non-willful failure to report, not willful.

20 MR. LINDER: I agree. I understand. My point is,  
21 regardless of willful or non-willful, the purpose of the  
22 statute is to get people -- people were hiding accounts in  
23 foreign countries. They were -- they were not reporting this  
24 on their tax returns. They're using these accounts for illegal  
25 purposes.

1           The purpose is to report the account, and that's what  
2           they're penalizing is they want the accounts to be reported.  
3           Not some of them. All of them. And I don't see those two  
4           people -- those are two different people. I mean, they  
5           result in different things, which you have one person  
6           reporting an account and one person failing to report five.  
7           I think they're different.

8           Were there more questions? I'm sorry, Your Honor. I  
9           was waiting for your question or follow-up.

10           THE COURT: Oh, you can go ahead and continue. If I  
11           have other questions, I'll jump in. Go ahead.

12           MR. LINDER: Oh, okay. I'm sorry.

13           So I think one of the other -- I think as we were going  
14           over it, the purpose -- what Congress was trying to do and  
15           the purpose of these statutes is to increase account  
16           reporting, and having a -- having it to just be a violation  
17           for not filing a form isn't going to accomplish that  
18           purpose.

19           I think what is important here is I think Mr. Bittner's  
20           position is asking the Court to ignore the relevant case  
21           law. I think Boyd is a case on point. Another case that  
22           decided that was Ott and another case is Gardner. None of  
23           these courts have come in and said that the statute is so  
24           unclear that they couldn't determine that it was an on  
25           account basis. The most recent court was Schwarzbaum. Even

1 though it's a willful case, it specifically looked at a per  
2 form violation versus a per account violation and said if it  
3 is willful, it is a per account violation.

4 There's nothing in the statute or the legislative  
5 history to suggest, other than the magnitude of the penalty,  
6 that we're treating willful and non-willful violations and  
7 the reporting requirements for foreign accounts differently.

8 THE COURT: Well, but there's different language  
9 between -- and that's the issue here in terms of the willful  
10 versus non-willful. And it seems like common sense says you  
11 might treat those differently, someone who doesn't willfully  
12 fail to file a report versus someone who intentionally does it.

13 MR. LINDER: And I think -- I think the statute  
14 recognizes that. I think that's why the penalties for willful  
15 violations are at least ten times greater. It's a hundred  
16 thousand per account versus 10,000 per account. I think that's  
17 the recognition of the difference between the willful and  
18 non-willful.

19 There's also taking into account the 50 percent balance  
20 of accounts for the willful, and that takes into account  
21 somebody who might have just one account but with an  
22 incredibly high balance in that. So I do think the statute  
23 provides a difference between willful and non-willful, and I  
24 think it has to do with the magnitude of the penalty.

25 But the underlying point of the statute is to report

1 accounts. The underlying point of the penalty is to get  
2 people to report accounts and to -- and to issue violations  
3 for people who don't report the accounts.

4 THE COURT: Well, let me ask you this.

5 MR. LINDER: Sure.

6 THE COURT: So Section 1010.350(a), it seems to  
7 contemplate an annual reporting requirement. So looking at the  
8 statute and its implementing regulation, how does the phrase,  
9 quote, the amount of any civil penalty shall not exceed  
10 \$10,000, close quote, mean anything other than that? No matter  
11 how the Secretary decides to calculate the penalty for  
12 non-willful violators, the penalty cannot exceed \$10,000 for  
13 every year of non-compliance.

14 MR. LINDER: Well, I -- I think -- I don't think -- I  
15 think you can read that, but I think what you're looking at is  
16 you're looking -- I don't think that you're inserting form --  
17 1010.350 is talking about accounts and reporting accounts and  
18 it's not talking about forms.

19 I think the difference is you're -- it's trying to  
20 insert "form" in the place of "accounts", and I think that's  
21 the difference. I do think the statute is clear on that.

22 THE COURT: Well, so if we find that this statute  
23 command is somehow ambiguous, what principle of law or method  
24 of statutory interpretation should apply here to allow a nearly  
25 \$1.7 million penalty, if it's ambiguous?

1 MR. LINDER: If it's ambiguous. I think what you're  
2 looking at, I think you look back to the intent of Congress and  
3 what they were trying to achieve with the passing of the  
4 statute. And I don't think Congress was concerned, when you  
5 look at the history, with the filing of additional forms and  
6 let's get some more forms filed from people. I think they're  
7 looking to get the accounts and get the proper number of  
8 accounts and the proper account information.

9 And that's the requirement. That's the purpose of the  
10 statute, the reporting statute, and that's the purpose of  
11 the penalties for not filing a reporting statute. I think  
12 that's what you look to.

13 And under rule of lenity, I mean, this isn't a casual  
14 situation. I mean, you can look at the demonstrative and  
15 see that all the accounts aren't reported. There's a high  
16 level of penalty, a high amount of penalty in the aggregate  
17 because there are a high number of accounts in the aggregate  
18 not reported, and the statute makes no distinction between  
19 whether it's a personal account or a 50 percent account.  
20 It's an account that has to be reported. If it's not  
21 reported, it's treated as the same.

22 THE COURT: Well, could the rule of lenity apply in  
23 this situation if there's two reasonable interpretations?

24 MR. LINDER: I -- I don't think it does. One, I  
25 don't think there's two reasonable interpretations. I don't

1 think the rule of lenity applies because you have to look at --  
2 I think for the rule of lenity you're looking at the conduct,  
3 and the conduct does not -- that they reported is not innocent.  
4 I don't think the conduct of a person failing to report one  
5 account is the same as somebody that didn't report 272. And I  
6 think that's why the rule of lenity is -- you wouldn't apply  
7 it. That's why I don't think you would apply the rule of  
8 lenity, because it's not the same conduct and it shouldn't be  
9 treated the same.

10 THE COURT: Well --

11 MR. LINDER: And applying the rule of lenity  
12 automatically makes every person, every violation the same.

13 THE COURT: Well, even in the Boyd case which y'all  
14 cite, the Central District of California, they describe Section  
15 5321 as somewhat unclear as to whether the \$10,000 negligence  
16 penalty applies per year per account. So if the Court,  
17 likewise, finds that Section 5321 is unclear, why should the  
18 Court not apply the rule of lenity and hold that Section 5321  
19 applies on a per year basis?

20 MR. LINDER: Because I think before you get to the  
21 rule of lenity and the statutory construction, you have to look  
22 back at the purpose of the statute, and applying the rule of  
23 lenity in every case is not going -- is not going to further  
24 the purpose of the statute and further reporting of the  
25 accounts.

1 THE COURT: And let me ask you too, in Boyd the Judge  
2 there references an administrative rule of lenity. Does the  
3 Court need to even make such an inquiry versus congressionally  
4 enacted rather than administratively promulgated regulations?

5 I haven't really looked at that concept, but I know the  
6 Judge there makes reference to administrative rule of  
7 lenity.

8 MR. LINDER: I --

9 THE COURT: Is there a difference, in your mind, of  
10 how -- if we get there?

11 MR. LINDER: No, there -- I haven't -- I have to be  
12 honest with the Court, I haven't looked at the administrative  
13 rule of lenity that closely, if at all, and I don't think it  
14 would make a difference in our analysis or in my argument  
15 today, Your Honor.

16 THE COURT: Okay.

17 MR. LINDER: And we've covered I think -- I think  
18 when you look at our demonstrative number two on the accounts,  
19 I think it's clear what the purpose of Congress and the  
20 purposes of the statute in reporting accounts, that a person  
21 that has five unreported accounts is not the same as somebody  
22 who has 272.

23 Likewise, I think five violations does not equal 272  
24 violations, and I think that's why the \$10,000 maximum  
25 penalty should be on a per account basis.



1 THE COURT: Well, let me ask you this. So the  
2 non-willfulness portion of the statute authorizes a civil  
3 penalty against any person, quote, who causes any violation,  
4 end quote, of Section 5314. So a person who causes a violation  
5 of Section 5314 would not need to have any personal control  
6 over the money in the account or personal control over the  
7 number of accounts maintained, would he? It wouldn't seem so  
8 from the statutory language.

9 MR. LINDER: Wouldn't have control? I think --

10 THE COURT: Well, because it says who causes the  
11 violation, so in terms of 5314, it authorizes the penalty  
12 against someone who causes a violation of it.

13 MR. LINDER: Well, one, I think you have to look at  
14 the reporting requirement, who has to report. And I think when  
15 you're talking about causes the violation, there's other --  
16 there's other individuals who have to file reports. Some have  
17 to do with people that have signatory authority or authority  
18 over accounts that aren't theirs but they're just in charge of  
19 the corporation by their -- be it they're president or CEO.

20 So I think when you look at that, I think the person  
21 that causes the violation -- I think what's throwing you  
22 off, the person that causes the violation is the person that  
23 does the violation, and I think that's the taxpayer, the  
24 person that failed to file the report.

25 THE COURT: Well, Mr. Linder, what I'm getting to is

1 how does it make sense to punish that individual on a per  
2 account basis when the accounts and money may not even be his?

3 MR. LINDER: Because -- because you have a reporting  
4 requirement of the accounts. You have a -- of accounts that  
5 are yours, that you have a financial interest in and signature  
6 authority over, and then you have -- then the reporting statute  
7 requires you to report accounts that you have control over  
8 where you have more than 50 percent ownership. For example,  
9 your own company, so you would have control over that. I think  
10 that goes back to what you have to report.

11 THE COURT: So in your mind, if Mr. Bittner -- if  
12 this was not his money or not his accounts but he caused the  
13 violation of Section 5314 relating to those accounts, you think  
14 that the multimillion dollar penalty would still be statutorily  
15 authorized?

16 MR. LINDER: Yes, because the cause of the violation  
17 is -- Mr. Bittner is the one that's required to file the  
18 report. He caused the violation. It's his report he has to  
19 file. And if he has a reporting requirement based on ownership  
20 in a company of more than 50 percent, which he did have some  
21 of -- many of these or some of the accounts, if not many,  
22 however you want to term it, he did have a reporting interest.  
23 He had greater than 50 percent ownership of that company.

24 So, yes, he has to report those, and the person that  
25 causes the violation is him because he didn't report the

1 accounts.

2 THE COURT: And let me ask you, on -- is Boyd the  
3 only case -- I think it's the only case y'all cited that deals  
4 with the direct question we have in this case, that actually  
5 deals with the question of a non-willful violation, whether it  
6 should be based on per year or per account.

7 MR. LINDER: I would say yes, Boyd is the one that  
8 was the most -- it was a contested issue in Boyd. I think the  
9 question was addressed in the Ott case but the Court -- I don't  
10 think it was a dictum. I think the Court made a conclusion or  
11 determination that it was a 10,000 per account issue. But I  
12 don't believe, based upon my review of some of the pleadings,  
13 that that was a very hotly contested issue as it was in Boyd.

14 Gardner was a default judgment case where the Court  
15 made its own rulings, so obviously that would not be  
16 contested.

17 And I think the most recent Court that addressed the  
18 per account versus per form was Schwarzbaum, but I do have  
19 that, Your Honor, and I can provide that opinion to the  
20 Court. That was a willful case.

21 So I think the most contested case out there, in  
22 fairness, is Boyd, and that is up on appeal. I think the  
23 briefing is completed on that.

24 THE COURT: And would it be safe to say -- I know the  
25 Judge in Boyd makes a conclusion but I didn't see necessarily a

1 lot of analysis of coming to that conclusion, that it should be  
2 based on the way the Government -- what you're advocating here  
3 today in the Bittner case.

4 MR. LINDER: I mean, are you asking --

5 THE COURT: Well, does that conclusion --

6 MR. LINDER: I guess it would be better for the  
7 Government if there had been more analysis because then it  
8 would be more supportive. But I think there was analysis, and  
9 we were working off that analysis. I mean, I can only work  
10 with what the Court did in the case and reported, Your Honor.

11 THE COURT: I understand. So that probably wasn't a  
12 fair question. Let me ask you, are you aware of any  
13 interagency interpretations of the relevant statute and  
14 regulatory provisions?

15 MR. LINDER: Interagency? Well, I mean, the only --  
16 I don't think -- we really don't have interagency  
17 interpretations. I think you have the IRM, which is their  
18 guidance of what they think it is.

19 I can tell you the position of the Government is that  
20 it's -- of the United States is that it's a per account  
21 basis.

22 We don't publish -- I don't think there's any Treasury  
23 regulation. I would have to look, but I think we would have  
24 cited them. But I think that's the Government's position,  
25 it's a per account basis.

1 THE COURT: And then let me ask you, you know, in the  
2 statute Congress sought to, quote, avoid burdening unreasonably  
3 a person making a transaction with a foreign financial agency,  
4 end quote. Congress then divided the appropriate penalties  
5 between two the types of violators, willful and non-willful.  
6 Shouldn't the Court read the non-willful provision in such a  
7 way as to err on the side of under-burdening rather than  
8 overburdening a non-willful violator?

9 MR. LINDER: Well, I -- I don't think the  
10 overburdening has to go to the violation. I think the  
11 overburdening has to go to how the accounts are reported. I  
12 don't think -- I don't think Congress wanted -- for example, in  
13 the case of Mr. Bittner, I think over a five year period I  
14 think it would be burdensome to file 272 FBARs.

15 I think the overburdensome comes to -- was an  
16 instruction of how -- or maybe an instruction of how the  
17 Treasury Secretary should make the reporting of the accounts  
18 in such a way that it wasn't burdensome.

19 I don't think it goes to the -- to the violation. I  
20 don't think those are read in conjunction. I think the  
21 violation is not reporting the accounts.

22 THE COURT: Thank you.

23 MR. LINDER: And that's all I have on the issue  
24 regarding the 10,000 per account issue.

25 THE COURT: And I know -- did you want to address

1 other issues? Your motion, of course -- their motion only  
2 dealt with the one issue, but your motion deals with others.  
3 That's totally up to you if you want to address that or rely on  
4 the papers.

5 MR. LINDER: I think -- well, we've been on for a  
6 long time. That was the main issue. I think we would like to,  
7 one, address a couple of issues I think to kind of clear up for  
8 the Court the United States' motion for summary judgment.

9 I think when we look at the Government's first  
10 demonstrative, our complaint sought 2.7 million worth of  
11 non-willful FBAR penalties for the 2007 to 2011 years.

12 The United States did not move on -- move for summary  
13 judgment on the 2011 year that we thought there was -- based  
14 upon our analysis, there was a reasonable fact issue  
15 regarding that year.

16 In regards to what we did, the Government did move for  
17 full summary judgment on the accounts that Mr. Bittner in  
18 the case admitted he was required to report, and there  
19 isn't -- there were several accounts. I think I have listed  
20 on here 38 that Mr. Bittner later asserted that he didn't  
21 have a reporting requirement for those accounts. So we  
22 excluded those so we could get to the real issue on the  
23 rulings, and that's Bittner's liability for the accounts  
24 that he admitted on as set forth in this, in the  
25 demonstrative, and that's the 1.77 million.

1 And that is still consistent on the per account basis.  
2 So we removed those accounts that would have been a  
3 contested fact issue. There is no contested fact issue Mr.  
4 Bittner was required, and he admitted he was required to  
5 report 177 accounts over the 2007 to 2010 timeframe.

6 There's no contested issue he failed to report those  
7 accounts. Mr. Bittner is a U.S. person required to do so,  
8 and Mr. Bittner is liable.

9 It's uncontested that the IRS assessments were timely  
10 and this suit was filed timely.

11 Therefore, the United States moves for summary judgment  
12 to establish his liability for those 177 violations for the  
13 2007 to 2010 year.

14 We believe Mr. Bittner has -- cannot establish  
15 reasonable cause. Mr. Bittner has to establish reasonable  
16 cause. It's his burden.

17 The United States addressed this issue in its motion  
18 for summary judgment because it is a safe haven and it is  
19 directly in the statute, so the United States addressed it.

20 Mr. Bittner, as all defendants who have FBAR  
21 violations, claims and asserts that he didn't know. And the  
22 few courts that we have that are reviewing non-willful FBAR  
23 penalties for reasonable cause, which are Jarnagin, Moore --  
24 I'll get this name wrong -- Agrawal and Ott recognize this  
25 and all came in and wanted some additional steps, some

1 affirmative steps that the taxpayer did to learn of their  
2 reporting requirements.

3 In this case Mr. Bittner had done nothing. He did  
4 nothing during the years at issue to learn of his reporting  
5 requirements. He didn't do any research. He had an entire  
6 accounting staff or department in Romania. He didn't ask  
7 them one question the entire time he was there about federal  
8 income taxes or federal bank reporting requirements.

9 Mr. Bittner asserts he registered at the Embassy, but  
10 he didn't ask a single U.S. official about any kind of  
11 foreign bank account reporting or even about taxes. He's  
12 admitted he failed to make any inquiries of anyone while he  
13 was in Romania regarding his federal income taxes or these  
14 foreign bank accounts.

15 He simply has taken no steps, and it's clear he just  
16 didn't want to do it. He didn't care. And that's not  
17 reasonable cause. He didn't care because he was more  
18 interested in making money, more interested in doing  
19 business, and that doesn't meet reasonable cause.

20 And one of the issues brought up on the sur-reply was  
21 you offered this opinion, the Congdon case versus United  
22 States, where it was found -- summary judgment was denied on  
23 reasonable cause. But there was a big fact left out by Mr.  
24 Bittner when analyzing the Congdon case was that in Congdon,  
25 that issue was 5471 penalties that goes with the return that



1 in Congdon they actually filed the Form 5471s. They were  
2 substantially complete, but they actually filed them.

3 Mr. Bittner didn't timely file his 2007 to 2010 FBARs.

4 The Congdon case would be more applicable to the 2011  
5 year where Mr. Bittner did file a FBAR, an incomplete FBAR,  
6 timely but incomplete. But that -- we did not move for  
7 summary judgment on that year. So we did believe the  
8 Congdon case was not applicable.

9 Congdon also reported much of the information that was  
10 on or should have been on his 5471 on his tax returns. In  
11 this case Mr. Bittner didn't do that. He didn't timely file  
12 his 2007 through 2010 tax returns, so the IRS didn't have  
13 the information about the accounts, didn't have all the  
14 information about his income that would have been related to  
15 unreported foreign accounts.

16 So we think -- we think the Congdon case is not  
17 applicable.

18 The United States has moved forward to establish Mr.  
19 Bittner's liability on all the accounts that he's admitted  
20 to, this 177.

21 We believe we have met all of the -- the elements. We  
22 believe we have established he failed to have reasonable  
23 cause.

24 And I think the last main issue was the Eighth  
25 Amendment, which the United States addressed. And simply

1 put, we don't think the -- the FBAR penalties are a fine.  
2 It's the Government's position that these are -- the FBAR  
3 penalties are more remedial in nature, following Schwarzbaum  
4 and Schoenfeld and that they don't just don't rise to the  
5 level of a fine that's subject to the excessive fine clause.

6 The FBAR penalties are not in conjunction with any kind  
7 of criminal charge or criminal proceeding, like a  
8 forfeiture, and the FBAR penalties can be imposed without  
9 any kind of conviction, similar to a tax fraud penalty,  
10 which is also not an excessive fine.

11 We also believe under the Eighth Amendment that if the  
12 Court were to find that the Government's position that it --  
13 that a non-willful violation is a 10,000 per account  
14 violation, that by law that would not be an excessive fine  
15 because the Government assessed within the statute.

16 That is all I have at this time, Your Honor.

17 THE COURT: Thank you. Anything you would like to  
18 respond to on behalf of Mr. Bittner?

19 MS. RUBENSTEIN: This is Rachael Rubenstein. I'm  
20 just going to make two quick responses and then I'm going to  
21 let lead counsel finish up.

22 With respect to Mr. Linder's comments about it's  
23 everywhere in the statute and regs, the terminology of  
24 accounts, looking back at 31 CFR 1010.350 giving rise to the  
25 obligation, Subsection A doesn't say anything about account

1 but it does mention a reporting form. It doesn't mention  
2 accounts with respect to that obligation to file an FBAR.

3 I -- one other point regarding the Court's inquiry is,  
4 are there any inter-regulatory interpretation -- I can't  
5 remember the exact question, but having to do with whether  
6 or not inter-agencies. I did want to mention FinCEN.  
7 FinCEN did release in 2010 some proposed rules, and in that  
8 proposed rule, which is Exhibit G to Defendant's motion, it  
9 specifically states penalties: A person who is required to  
10 file an FBAR and fails to properly file may be subject to a  
11 civil penalty not to exceed \$10,000. FinCEN is the agency  
12 where you actually submit the FBAR to.

13 So those are all of my responses, and then lead  
14 counsel, Mr. Katz, was going to respond to the arguments  
15 made in the Government's motion.

16 THE COURT: Go ahead.

17 MR. KATZ: Thank you. This is Farley Katz. And as  
18 Rachael explained, we divided this up for me to respond to the  
19 Government, its motion for partial summary judgment.

20 First of all, the Government basically argues -- Mr.  
21 Bittner has repeatedly from the beginning stated under oath,  
22 in various witness statements and testimony and in  
23 depositions and otherwise, that he had never heard of an  
24 FBAR until he returned to the U.S., discovered that he  
25 should have been filing returns, finds an accountant who's

1 supposedly familiar with this, and in the course of meeting  
2 with that accountant he learned about FBARs. He never had  
3 any clue that foreign bank account reports were required of  
4 him, because he had been a naturalized citizen many years  
5 ago, even though he was living in his country of birth for  
6 over 20 years. He had never heard of it.

7 And that's not at all surprising. There is a Treasury  
8 report which we quoted saying that many, many people living  
9 abroad are not aware of these things, of the FBAR  
10 requirements.

11 The IRS has issued special guidance saying that the IRS  
12 is aware -- this is FS 2011-13. The IRS is aware that some  
13 taxpayers, who are dual citizens of the U.S. and a foreign  
14 country, may have failed to timely file tax returns and  
15 FBARs, despite being required to do so. Some of those  
16 taxpayers are now aware of their filing obligations and seek  
17 to come into compliance with the law.

18 And that goes on and says you can do that. You should  
19 do that. You should do six years' worth. And if you had  
20 reasonable cause, you can avoid penalties. And that's been  
21 the IRS's position throughout these cases, that if you have  
22 reasonable cause, you can avoid the penalty.

23 The IRS does not say everyone is deemed to know the  
24 law, that Mr. Bittner, despite the fact that he did not know  
25 about FBARs, is deemed to know the law, and therefore, you

1 must -- everyone must pay the maximum penalty.

2 This Court's opinion in Congdon is very similar to Mr.  
3 Bittner's case. It involved Internal Revenue Code Form  
4 5471, which like an FBAR, is a report on a foreign relation  
5 or related transaction, in that case owning an interest in a  
6 foreign company, and Mr. Congdon -- he did file one but it  
7 was basically blank. He thought that that was sufficient,  
8 and he didn't understand that he had an obligation to fill  
9 it out. And the Government argued -- the Government in that  
10 case -- he believed it was sufficient just to put the  
11 information on his 1040, which it really wasn't there, and  
12 just putting a simple entry on 5471. The 5471 is like a  
13 virtual tax return for a corporation. It's a very long,  
14 complicated form. The Government argued that neither  
15 ignorance of the law nor complexity constitutes reasonable  
16 cause.

17 It's the same situation we have here. He -- in our  
18 situation, he, Mr. Bittner, was not aware the forms even  
19 existed. Mr. Congdon knew about the form, filed it, but had  
20 no clue that he actually had to fill it out. Not that  
21 different.

22 This Court said ignorance of the law by itself is not  
23 reasonable cause, but reasonable cause may be established if  
24 the taxpayer shows ignorance of the law in conjunction with  
25 other facts and circumstances, such as the taxpayer's

1 education, whether he's previously been subject to the tax,  
2 if he's been penalized before, et cetera, et cetera.

3 The Government's central argument here is that Mr.  
4 Bittner, living in Romania for 20 years, he does comply with  
5 Romanian tax law, pays his Romanian taxes. In fact, he was  
6 given credit, tax credits for those in the tax case and  
7 that's -- that's one reason why he owed nothing for '08, '09  
8 and '10. Zero U.S. tax owed for those years.

9 The Government said -- the Government's position is,  
10 gee, Mr. Bittner, who had never heard of such a thing about  
11 a reporting to the U.S. Government or the Treasury if you  
12 have a foreign bank account, he had never heard that  
13 existed, he is supposed to go and ask people, does that  
14 exist. How can he even formulate that question? He had no  
15 awareness it existed.

16 They're saying, you know, you didn't -- you know, you  
17 didn't ask people. You should have asked people in Romania.  
18 Well, the people in Romania, as he testified in his  
19 deposition, don't have a clue about that stuff.

20 And he did have an accountant in Romania who helped  
21 him, and his accountant did not explain -- his accountant  
22 knew everything he was doing, was very cooperative, and his  
23 accountant didn't tell him that he had to file FBARs because  
24 his accountant had never heard of it.

25 Even the accountant he goes to here had no clue about

1 having to report foreign bank accounts of companies that  
2 he had an interest in. So it's just not that -- it's not  
3 that simple of a form. It's not like an income tax return  
4 that almost everyone, maybe everyone knows about. People  
5 don't know about FBARs.

6 The -- the reasonable cause is not defined in the FBAR  
7 statutes, but as -- as this Court recognized, in regs of the  
8 5171 forms and there are several similar income tax forms  
9 dealing with foreign entities, reporting of those things,  
10 they all say, all of them say reasonable cause is all the  
11 facts and circumstances.

12 And the IRS has routinely allowed people who were not  
13 aware that they had to file FBARs, had never heard of FBARs,  
14 they routinely allow them to avoid -- to escape penalties  
15 under that, under the reasonable cause state.

16 When you look at the factors here, the accounts, these  
17 are factors Courts have looked at to see if there's  
18 reasonable cause, besides being unaware of the law.

19 Again, it's not -- this is not a situation where it's a  
20 person living in the U.S. who knows about the taxes that  
21 says I never heard of a 1040. That's not the situation.  
22 It's a situation where the Government has recognized people  
23 have not heard of this.

24 The accounts all have legitimate purposes. They all  
25 relate to businesses in Romania. He had paid his taxes. He

1 was given tax credits for them. He's not -- he wasn't doing  
2 anything to cheat on U.S. taxes. He had no clue that he had  
3 any taxes owed.

4 He voluntarily disclosed everything. These were  
5 voluntary disclosure, and it's a voluntary disclosure but  
6 the -- he comes forward and, you know, there's been lots of  
7 voluntary disclosures. There are programs where we refer to  
8 them as streamline programs. There are programs where he  
9 could come in today, and other people in his same situation  
10 could come in and avoid paying any penalty, no penalty  
11 whatsoever. And yet, for some reason, the IRS has decided  
12 that the absolute maximum is the only thing that would  
13 justify here.

14 We said -- and I'm going to -- let me go on to the  
15 excessive fines. The Supreme Court in *Bajakajian* and in  
16 other cases often has held that the -- the excessive fines  
17 clause applies to civil fines and penalties. The basic  
18 question is, are you looking at something as punishment?  
19 Are you looking at something as punishment?

20 And it's subject to the Eighth Amendment, even if  
21 there's some remedial purpose. And somewhere in the *bruits*  
22 here the Government admitted that this was at least  
23 partially remedial.

24 But clearly we're looking at punishment here. This is  
25 definitely punishment. To begin with, the amount is



1 astronomical. 2.7, 1.7, whatever it is, would not -- for,  
2 at worst, negligently not filing one form each year for five  
3 years? It can't be anything but a penalty. It's called a  
4 penalty.

5 The purpose is deterrence, and when you look at the  
6 definition in these cases, in Bajakajian and Austin, the  
7 Supreme Court cases, they say if it's to -- if it's to  
8 compel or prevent or deter non-compliance, it's a penalty.

9 The Government, indeed, argues that a lesser amount  
10 here wouldn't be sufficiently deterrent, so it's clearly  
11 punishable. It's not remedial.

12 There is no loss to the Government here. No loss  
13 whatsoever. They never heard of Bittner before he came  
14 forward and tried to make things right with this country.

15 He overdid it. He wanted -- anyone else would have  
16 done six years. He wanted to do 22 years because he had  
17 this idea, probably from dealings with the Government  
18 elsewhere, that he wanted to be absolutely straight with the  
19 Government.

20 The Government hasn't made any proof or attempts to  
21 prove any losses whatsoever.

22 I might point out that in the tax case, the agent in  
23 this case wrote -- initially determined -- she did a bank  
24 accounts analysis and determined that Mr. Bittner didn't  
25 report \$11 million of income deposited to his personal bank

1 account, 11 million. And we gave them schedules. We have  
2 an expert and we gave them schedules showing she miscounted.  
3 She ignored non-taxable transfers. She put in income that  
4 was otherwise non-taxable. She double counted. She  
5 counted -- there was a CD that was mature. She treated that  
6 as two separate items.

7 And when we got to the tax court, the IRS conceded  
8 every single dollar of the bank accounts was accounted for,  
9 so there was no underreporting from these bank accounts that  
10 have anything -- that could possibly have -- have given --  
11 have resulted in harm.

12 So what's the rule? The rule is it violates -- under  
13 the Eighth Amendment, it violates the Eighth Amendment if  
14 the penalty, the punishment is grossly disproportional to  
15 the conduct.

16 I -- I can't imagine a case and I have never seen a  
17 case where it could be more clear. 2.7 million, 1.7 million  
18 for not filing five pieces of paper that you had no idea  
19 existed, what could be more disproportionate? And it's  
20 necessarily disproportionate because the agent, the same  
21 revenue agent who had no clue about how to do a bank account  
22 deposit, she had no clue about what the Internal Revenue  
23 manual, their own internal rules were for determining what  
24 the penalty was.

25 When you look at those rules, and we've got them quoted

1 in our brief, the manual says that in non-willful cases, the  
2 default rule, the standard rule, even if it's multiple  
3 years, is one \$10,000 penalty. The IRS says that's the  
4 standard. We will ordinarily recommend one \$10,000 penalty.  
5 The IRS has recognized, getting back to the question raised  
6 earlier, that is sufficiently adequate to encourage  
7 compliance.

8 Then it goes on and says in fact, you can -- you can  
9 actually impose nothing. You can just give a warning  
10 letter.

11 And then it says if the facts deserve it, you can go  
12 higher. If the facts warrant it, you can impose 10,000 for  
13 each year, which would be 50,000.

14 Then they go further than that, which we disagree with,  
15 and they say in fact, you can go up to -- higher than  
16 50,000, higher than one penalty per year, if the facts -- if  
17 the manager reviews it, if there's justification for doing  
18 it, if it's an extreme case.

19 So the agent thought -- it's her understanding, and we  
20 quoted her testimony in deposition, her understanding was  
21 you have four choices: No penalty, one \$10,000 penalty,  
22 five \$10,000 penalties, or if she thought that it was -- it  
23 was worse than five \$10,000 penalties, she had no choice,  
24 she couldn't have -- she had to go then to the statutory  
25 maximum of 2.7 million. That's how she read those rules.

1           Those rules don't read that way. It would be -- it  
2 would be inherently absurd for those rules to read that way.  
3 The Government has acknowledged that she doesn't have to do  
4 that. She could choose -- she could choose -- if 50,000  
5 wasn't enough, she could choose a hundred thousand. But she  
6 could propose a hundred thousand, given her manager approved  
7 it.

8           But she made no determination that it was  
9 proportionate. She made -- and she admitted this. She made  
10 absolutely no determination. All she decided was it's worse  
11 than 50,000, and therefore, I'm going to the statutory  
12 maximum. So she made no determination of proportionality.  
13 So on its face, it's not going to be proportional.

14           Her penalty was based on false and irrelevant facts.  
15 She said Mr. Bittner has an engineering degree from Romania,  
16 and therefore, he should have known about foreign bank  
17 account reports in the U.S. I don't get that.

18           She said he filed U.S. tax returns, and the Government  
19 repeats it. He filed U.S. tax returns in early years.  
20 Well, she doesn't mention that those were prepared by family  
21 and reported only income from some business in the U.S. that  
22 he had an interest in.

23           He had no clue that he had to file U.S. tax returns on  
24 Romanian income. He's testified to that many times. And  
25 many people do that.

1 Now, this isn't in isolation. We're not dealing with  
2 something in isolation here. Every action the IRS has taken  
3 against Mr. Bittner has been grossly disproportionate.  
4 They -- the agent decided he had \$11 million of unreported  
5 bank deposits. In fact, when we actually got someone who  
6 could analyze the account, they agreed it was zero, not one  
7 cent.

8 Then they asserted \$14 million of income tax and  
9 penalties that went to the tax court. It was settled for  
10 4.6 percent of that, 4.6 percent.

11 And I point that out just to show that the IRS, for  
12 reasons that I do not understand, has decided to treat Mr.  
13 Bittner worse than anyone else, and everything they have  
14 done is grossly disproportional. In fact, we believe that  
15 this is the greatest fine the IRS has ever asserted on  
16 anyone, any individual, for non-willful conduct, for  
17 innocent conduct. Maybe it was negligent, but we have never  
18 seen anything like this. The Government doesn't want to  
19 answer that question in discovery, but we have not seen  
20 anything.

21 And Mr. Bittner -- getting back to the factors you look  
22 at, he's not in a class of persons the statute is directed  
23 at. The statute is directed at persons engaged in unsavory  
24 activity, income evasion, schemes to defraud, et cetera.  
25 That's not true. He returned to his country of birth.

1           And I'll just -- excuse me just one second. Let me  
2           make sure I covered everything here.

3           Let me just sum up. I'm going to quote something from  
4           our -- our sur-reply. And I didn't write this. Someone  
5           else here wrote this and I like it. It is unreasonable and  
6           senselessly punitive to impose millions of dollars of  
7           penalties on someone who lived abroad for over 20 years, had  
8           minimal contact with the U.S., had no communications with  
9           any U.S. professional, simply because he was unaware of a  
10          particular U.S. information reporting obligation and did not  
11          take affirmative steps to learn about it, which he -- there  
12          was no reason for him to do so.

13          If you can't -- if you don't know there are U.S.  
14          banking requirements, reporting requirements, how can you  
15          ask someone? And if he had asked those people in Romania,  
16          they wouldn't have known.

17          Thank you, Your Honor.

18                 THE COURT: Thank you. Any response, Mr. Linder?

19                 MR. LINDER: Your Honor, I'm not going to respond to  
20          the unsubstantiated allegations by Mr. Katz. I think the  
21          facts -- the United States has set forth its facts in the  
22          exhibits and in its motion and response, and Mr. Bittner has  
23          set forth his facts. And other than that, we won't comment on  
24          his -- I don't think it's proper for the Court to consider his  
25          allegation regarding the agent and her conduct.

1           The point is Mr. Bittner failed to report 272 account  
2 violations. The IRS assessed its maximum amount that was in  
3 the law, and the assessments were proper and timely and Mr.  
4 Bittner is liable.

5           That's all we have to say, Your Honor.

6           THE COURT: Okay. And then anything -- anything else  
7 before we finish? Okay.

8           MS. RUBENSTEIN: No, Your Honor, not from Mr.  
9 Bittner.

10          THE COURT: Okay. Well, thank y'all for your  
11 argument. I'll take the matter under advisement and I hope  
12 to -- I'll try to get a decision out as quick as I can.

13          I will tell you the Court -- because we're past the  
14 issue of the virus, the Court is really busy. I had a bench  
15 trial last week and we've been back in court and I did 35  
16 sentencings over the last two days, and I resume jury trials  
17 starting Monday. And I have a jury trial set June 8th,  
18 June 15th, June 23rd and June 30th. So the Court is getting  
19 back into it.

20          And so I say all that because this may take me a little  
21 time. This is a very -- it's an important issue and it's  
22 first impression here in the Fifth Circuit, so we'll be  
23 working on it and try to get it done as quick as possible.

24          If there's nothing else --

25          MS. RUBENSTEIN: Thank you, Your Honor.

1 THE COURT: The Court will be in recess. Thank  
2 y'all.

3 MR. LINDER: Thank you, Your Honor.

4 MR. KATZ: Thank you.

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18 I certify that the foregoing is a correct transcript from  
19 the record of proceedings in the above-entitled matter.  
20

21 \_\_\_\_\_  
22 Jan Mason

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Date